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Supreme Court of the United States

OCTOBER TERM 1937

No. 123

HARVEY S. ADAMS, RECEIVER, PENN NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA, *Petitioner*,

v.

GENEVA M. NAGLE, RALPH S. HILL, JAMES H. PENGELLY AND WILLIAM M. MAYER.

No. 124

HARVEY S. ADAMS, RECEIVER, READING NATIONAL BANK AND TRUST COMPANY OF READING, PENNSYLVANIA, *Petitioner*,

v.

J. EDWIN TOBIAS, RALPH S. HILL AND OSCAR P. SMITH.

REPLY BRIEF BY PETITIONERS.

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
CHARLES W. MATTEN,
Attorneys for Petitioner.

GEORGE P. BARSE,
Attorney for Comptroller of Currency,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF BY PETITIONERS.

Respondents urge in their brief (pages 30-34) that there was no authority in the Comptroller of the Currency to set aside the agreements of February 17, 1933 and February 20, 1933.

Petitioners submit that the Comptroller had ample authority to take that action. Paragraph 5 of the agreement of February 17, 1933 (Record 13) provided that the transfer of assets by the Penn National Bank and the Reading National Bank was:

> "Conditioned upon the assumption by Farmers National Bank and Trust Company of Reading of all the deposit liabilities of the companies as well as other liabilities thereof. * * *".

Obviously this included the implied requirement that the Farmers Bank would not only assume these obligations but pay them. The condition was not met and the Farmers National Bank in legal effect committed an anticipatory breach by either becoming, or being, in a condition whereby it was incapacited from performing the obligation. It carried on business for thirteen days after February 17th, was closed by the banking holiday proclamation, was not reopened for business, and according to the allegations to the bill of complaint (Record 6-7, paragraph 15) it was found that the Farmers National Bank

> "was unable to transact and carry on its ordinary banking business, or to exercise its usual banking functions without prejudicing the rights of depositors and other creditors * * *,"

and that it was necessary in consequence thereof to place it in conservatorship. It remained in conservatorship and was placed in receivership on November 8, 1934 (Paragraph 23 bill of complaint, Record 9).

The law is settled that where one party to an executory contract either files voluntary bankruptcy or is placed in involuntary bankruptcy, such action is tantamount to anticipatory breach and entitles the other party to the contract to rescind. *Kamps and Sacksteder Drug Co.* v. *United Drug Co.*, 160 N. W. 271, 272; 164 Wis. 412; *Central Trust*

Co. v. *Chicago Auditorium Association*, 240 U. S. 581, 589, 591, 592; *Johnston* v. *Grimm*, 229 N. W. 716-719; *United Press Association* v. *National Newspaper Association*, 237 Fed. 547, 553. Receivership of the Farmers Bank was analogous to bankruptcy.

It seems clear that had the Penn National and the Reading National Banks not been placed in receivership, they would have had full authority, in view of the inability of the Farmers National Bank to reopen and carry out its contract, and its subsequent conservatorship,—to treat such action on the part of the Farmers National Bank as an anticipatory breach as well as a complete failure of consideration, and to rescind the contract and be restored to statu quo by the recovery of their assets, under the plainest principles of equity.

The receiver, under Section 5234, Revised Statutes (Sec. 192 U. S. C., Title 12; quoted pages 8 and 9 of respondents' brief) took over all assets and rights of action which these banks possessed, for administration under the supervision and direction of the Comptroller, and it was held in *Kennedy* v. *Gibson*, 8 Wall. 498, 506, that the receiver becomes a statutory assignee of the national bank when it is placed in receivership, and that he takes over all of its assets and choses in action. From this it follows that the conservator, (who had the rights of a Receiver, Davis Trust Co. v. Hardee, 85 F. (2) 571), and the Comptroller had the right under the existing circumstances to rescind the agreement of February 17, 1933, and restore the Penn and Reading Banks to their former status, taking into consideration the changes in accounts and assets that had occurred in the interim. The bill of complaint (Paragraph 19, Record 8) shows that this readjustment was based upon an examination and report of the national bank examiners of April 24, 1933.

Attention is also directed to a national bank receivership case decided December 2, 1937, by the United States Circuit Court of Appeals for the Seventh Circuit (not yet

reported), being No. 6215 of that court and entitled *Ella Pickett* v. *Louis G. Trixler, Receiver of Howard National Bank of Kokomo, et al.*

Respectfully submitted,

BRICE CLAGETT,
CHARLES E. WAINWRIGHT,
CHARLES W. MATTEN,
Attorneys for Petitioner.

GEORGE P. BARSE,
Attorney for Comptroller of Currency,
Of Counsel.